THE WHITE HOUSE

WASHINGTON

February 4, 2008

Dear Mr. Chairman:

Thank you for your January 31, 2008 letter inviting me or a designee to testify before the House Financial Services Committee on matters relating to the President's Signing Statement on the Sudan Accountability and Divestment Act. While we appreciate the interest the Committee may have in the Signing Statement, there are constitutionally-based concerns about providing direct testimony that will likely touch on communications to or with the President, and particularly those in the nature of legal advice. For those reasons, we must respectfully decline your invitation.

It is, however, the policy of the Administration to cooperate with the legitimate inquiries of Congress to the fullest extent possible. In that spirit and toward that goal, we are prepared to provide an informal briefing to your Committee, presented by subject-matter experts within the Executive Branch, if that is desired by you.

Additionally, permit me to draw your attention to the following letters, which set forth the specific issues within the Act that caused concern to the Administration: October 26, 2007, Letter from the Department of Justice to The Honorable Richard B. Cheney, President of the Senate; October 22, 2007, Letter from the Department of State to the Honorable Harry Reid; October 22, 2007, Letter to the Honorable Mitch McConnell. I believe these will also inform your Committee's work.

With high regards,

Respectfully yours,

Fred F. Fielding
Counsel to the President

The Honorable Barney Frank
Chairman
House Committee on Financial Services
United States House of Representatives
2129 Rayburn House Office Building
Washington, DC 20515

cc: The Honorable Spencer Bachus

**U.S. Department of Justice**

Office of Legislative Affairs

Office of the Assistant Attorney General

*Washington, D.C. 20530*

October 26, 2007

The Honorable Richard B. Cheney
President
United States Senate
Washington, D.C. 20510

Dear Mr. President:

This letter presents the views of the Department of Justice on the Sudan Accountability and Divestment Act as amended on October 16, 2007. The Department shares Congress's concern about the continued violence in Darfur and appreciates the Senate Banking Committee's willingness to discuss our comments on the bill's predecessor, H.R. 180. However, the Department must oppose the current bill, and specifically the portion authorizing State and local divestment, for the same reasons the Administration opposed the divestment authorization in H.R. 180. This aspect of the bill raises grave constitutional questions for a number of reasons, most notably because it purports to immunize from Federal oversight State and local divestment actions that could interfere with national foreign policy under Supreme Court precedent. In so doing, the bill goes far beyond merely acknowledging, or even expressing support for, the divestment activity in which most State and local governments already engage as so-called "market participants." Instead, the bill purports to transfer to State and local governments, in a way that raises both constitutional separation of powers and federalism questions, foreign policy authority that the Constitution places, for very good reasons, with the Federal government. We strongly object to this effort because it raises concerns under a long line of Supreme Court cases and because it could jeopardize, rather than strengthen, the robust and carefully calibrated response to the crisis in Darfur that the Federal government is pursuing under presidential directives and several existing Federal statutes, including but not limited to the Sudan Peace Act of 2001, the Comprehensive Peace in Sudan Act of 2004, the Darfur Peace and Accountability Act of 2006, and the International Emergency Economic Powers Act.

## I. Background

The current version of the bill would, among other things, enshrine in Federal law a extraordinarily broad authorization for State and local governments to divest both public *and* private assets from, and prohibit the investment of such assets in, companies that engage in a wide range of business operations with the Government of Sudan ("GOS"). Section 3 of the bill begins by declaring the sense of Congress that the United States Government "should support the decision of any [s]tate or local government to divest from, and to prohibit the investment of assets of the State or local government in, a person that the State or local government determines poses *financial or reputational risk.*" (emphasis added). This hortatory provision provides virtually no limits on the State and local divestment the bill says the United States Government "should support." But the operative divestment authorization that follows it, which contains no limitations on the motivations for the actions covered by the bill, is even broader. Subsection 3(b) of the bill, entitled "Authority to Divest" provides:

> *Notwithstanding any other provision of law*, a State or local government may adopt and enforce measures that meet the requirements of subsection (d) to divest the assets of the State or local government from, or prohibit investment of assets of the State or local government in, persons that the State or local government determines, using credible information available to the public, are conducting or have direct investments in business operations described in subsection (c).[1]

The bill then affirmatively expands the reach of subsection's (b)'s divestment authorization in two remarkable ways: First, it defines "State or local government" as any governmental agency or instrumentality of a State, United States territory, or local subdivision thereof; any agency or instrumentality of any such local subdivision; and any public institution of higher learning within the meaning of the Higher Education Act of 1965. Second, and perhaps most notably, it defines "assets" of "State and local government entities" to include not just "public monies," but also "any pension, retirement, annuity, or endowment fund, or *similar instrument*, that is controlled, directly or *indirectly*, by a State or local government." (emphasis added).

In so doing, section 3 would authorize an extraordinarily broad, and therefore unknowable, universe of State and local divestments of public *and* private assets from, as well as "prohibitions" on investment in, companies that do business with the GOS, including European companies. This authorization applies "notwithstanding any other provision of law," and is accompanied by a "nonpreemption" provision stating that any "measure of a State or local government under subsection (b) is not preempted by any Federal law or regulation."

## I. Constitutional Concerns

"The Federal Government ... is entrusted with full and exclusive responsibility for the conduct of affairs with foreign sovereigns" under the Constitution. *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941); *see Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 448 (1979) ("In international relations and with respect to foreign intercourse and trade the people of the United States act through a single government with unified and adequate national power.") That is no accident. The Framers made this commitment intentionally in response to their "'concern for uniformity in this country's dealings with foreign nations.'" *Am. Ins. Assoc. v. Garamendi*, 539 U.S. 396, 414 (2003) (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427, n. 25

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[1] The subsection (d) requirements referenced in this provision require only that State and local governments provide the targets of divestment measures with notice of, and an opportunity to comment on, impending sanctions against them. Subsection (c) broadly defines "business operations" as operations that "include" "power production activities, mineral extraction activities, oil-related activities, or the production of military equipment" subject to a limited number of exceptions.

(1964)); *see also* The Federalist No. 80, pp. 535-36 (J. Cooke ed. 1961) (explaining that "the peace of the WHOLE ought not be left at the disposal of a PART. The union will undoubtedly be answerable to foreign powers for the conduct of its members. And the responsibility for an injury ought ever to be accompanied with the faculty of preventing it") (A. Hamilton).

This principle – the principle that the Nation must speak with "one voice" on issues of foreign policy – is the principle the Supreme Court has cited time and again in concluding that State laws must "give way if they impair the effective exercise of the Nation's foreign policy," *Zschernig v. Miller*, 389 U.S. 429, 440 (1968), and in invaliding State actions that conflict with the foreign policy of the Federal government. *See Garamendi*, 539 U.S. at 413; *Zschernig*, 389 U.S. at 440; *see also Crosby v. National Foreign Trade Council*, 530 U.S. 363, 381 (2000) (striking down, as inconsistent with Federal foreign policy, a Massachusetts statute that prohibited the State government from contracting with companies that did a certain amount of business with the Government of Myanmar).

There is no question that the types of State and local divestment activity authorized by the bill, (particularly divestments, even if some divesting entities call them "reputational," that flow from moral or political opposition to the policies of a foreign government, the GOS) implicate foreign policy under Supreme Court precedent. *See, e.g., Crosby*, 530 U.S. at 380-81. Indeed, one purpose of the bill appears to be to lift the Federal preemption that the Supreme Court and other Federal courts have cited consistently in invalidating State divestment and contracting regimes that interfere with national foreign policy. *See, e.g., Crosby*, 530 U.S. at 380; *Nat'l Foreign Trade Council v. Giannoulias*, No. 06-C-4251, 2007 WL 627630, at *8-*9 (N.D. Ill. Feb. 23, 2007). Section 3 of the bill, by its terms, could remove the threat of the direct statutory, or Article I Foreign Commerce Clause, preemption on which the Supreme Court relied in *Crosby*. But it is by no means clear that section 3 of the bill would — or that federal legislation could — remove any Federal preemptive force that flows from the Constitution's grant to the President of certain foreign affairs powers under Article II.

The Supreme Court decided *Crosby* on statutory preemption grounds because Congress had *not* lifted Article I (Foreign Commerce Clause) preemption in the area in question (Burma sanctions), but instead had passed Federal legislation with which the Massachusetts law conflicted. However, in its opinion, the Supreme Court emphasized that the Massachusetts statute was objectionable "*not* merely [because of] differences between the state and federal Acts in scope and type of sanctions," but *also* because the state statute "compromise[d] the very capacity of the President to speak for the Nation with one voice in dealing with other governments." *Id.* The Court developed this focus on conflicts between State law and the *President's* ability to conduct foreign policy in *Garamendi*, in which it expressly relied on the President's "independent constitutional authority to act on behalf of the United States on international issues" in striking down a California law that would have conflicted with that policy by "us[ing] an iron fist where the President has consistently chosen kid gloves." 539 U.S. at 424 & n.14, 427 (citing *Crosby*, 530 U.S. at 381).

The foregoing precedents raise the question whether the bill can constitutionally protect from Federal preemption all the State and local divestment and investment schemes it purports to authorize. They also raise a serious question why Congress would want to do so. Wholly apart from raising constitutional (separation of powers and federalism) issues, a legislative attempt to immunize such a broad range of State and local foreign policy action from Federal intervention is wholly inconsistent with the interest and responsibility that both Congress *and* the Executive have in ensuring that State and local government actions do *not* interfere with Federal foreign policy. The justification we have heard most often for the bill is that State and local governments should not be penalized for wanting to take their money away from entities that do business with bad governments. But that is not what the bill protects. It is obvious that the bill's sweeping divestment authorization is *not* necessary for States to engage in certain market-based divestitures. As the Congress is aware, State and local governments are already engaging in a wide range of divestment activities, most of which have *not* given rise to preemption lawsuits, much less Federal judgments invalidating the State schemes on foreign affairs grounds. The divestment portion of the current bill is necessary *only* if State and local governments want to expand their divestment activity to interfere with Federal foreign policy in a way that would merit the Federal intervention the bill seeks to prevent. We do not understand why Congress would want to protect such activity.

State and local governments, like the interest groups supporting this legislation, have neither the obligation nor the ability to consider how the divestments authorized by the bill could affect United States foreign policy. Congress and the Executive branch have both. As a practical matter, only the Federal government has the ability (primarily through its access to intelligence and its knowledge of broader diplomatic strategies) to understand how a particular economic action (here, divestment from, for example, European companies) could affect United States foreign policy with European governments on Darfur and other issues. Put simply, State and local governments lack both the Federal government's ability to know when it is necessary to approach an issue with kid gloves rather than an iron fist, and the Federal government's obligation to ensure that the proper approach is used when necessary to protect national interests. Federal legislation that broadly authorizes States to approach with an "iron fist" foreign policy issues that the President (or Congress) may find to require "kid gloves," now or in the future, is inconsistent with this obligation. Garamendi, 539 U.S. at 424 & n.14, 427. And it is inconsistent with all of the reasons that the Constitution rests foreign affairs authority with Congress and the President – and not the States – in the first place.

There are many ways the bill could avoid or mitigate this problem. An obvious, and highly effective, way is the amendment Senator Hagel proposed in committee. That amendment would provide a critical safety valve that the Federal government could use to limit State and local divestment schemes that threaten United States foreign policy. The Department has discussed this and other alternatives with Committee staff and we would welcome the opportunity to continue to work with Congress on solutions to the current problems with the divestment portion of the bill.

## II. Other Legal and Policy Concerns

The bill raises legal concerns beyond those outlined above, because it would not simply authorize States to act in an area in which the Federal government has chosen not to act. The bill would broadly authorize State and local divestitures in an area or field of foreign policy in which both Congress and the Executive branch are extremely active. In so doing, the divestment authorization in section 3 of the bill could call into question the effect of many existing Federal laws, including treaties and Federal statutes.

The bill expressly states that it authorizes the extraordinarily broad range of divestment activity covered by section 3 "notwithstanding any other provision of law." Section 2 of the bill cuts back on this statement by defining "business operations" subject to divestment to exclude certain business activities that the Federal government supports either under existing Federal statutes or, for example, OFAC licenses. But the list of exceptions in section 2 is no match for the broad range of Federal laws, treaties and executive orders that the "notwithstanding" language in section 3 could be interpreted to cover. Accordingly, this language in the bill could create a troubling situation in which State or local governments claim that the Federal government (including the Federal courts) cannot assert the supremacy of Federal laws against State or local regimes that conflict with those laws, or in which certain institutions are subject to comply with Federal requirements or policies that may conflict with the requirements of State or local divestment directives authorized by the bill.

Although the bill's proponents may believe that its divestment authorization is fully consistent with United States foreign policy on Sudan, that may not be the case in the future. It is entirely possible, for example, that a State could enact a divestment law pursuant to the bill's authorization that requires divestment in circumstances directly contrary to specific federal laws, or that simply take an inflexible approach to situations in which existing Federal statutes and Executive Orders provide for presidential flexibility. *See Crosby*, 580 U.S. at 381 (emphasizing that "the differences between the state and federal Acts in scope and type of sanctions ... compromise the very capacity of the President to speak for the Nation with one voice in dealing with other Governments").

The President has flexibility under existing federal laws to ensure that United States sanctions policy is highly targeted and carefully calibrated to account for nuances in relevant political and diplomatic climates. This kind of flexibility is important because, as the State Department testified, and then reiterated in its letter to Senator Reid of October 22, 2007, this is an important time for United States diplomatic engagement in Sudan. *See* Jendayi E. Frazer, Assistant Secretary of State for African Affairs, Testimony before the Senate Committee on Banking, Housing and Urban Affairs at 5 (Oct. 3, 2007) ("Frazer Testimony") (explaining that the GOS has publicly accepted the United Nations African Union/United Nations Hybrid operation in Darfur ("UNAMID"), has recognized the need to negotiate a peace deal, and is expected to participate, along with rebel groups, in peace talks set to take place this month); *see also* Elizabeth Dibble, Acting Assistant Secretary of State, Bureau of Economic, Energy and

Business Affairs, Testimony before the Senate Committee on Banking, Housing and Urban Affairs at 2 (Oct. 3, 2007) ("Timing is everything, and we believe it imperative to preserve the President's flexibility to decide when and how to calibrate the application of sanctions, so they can work to the maximum advantage.")

During this period, it is critical that the Federal government — the President, Congress and, if necessary, the Federal courts — retain the tools the Constitution gives them to ensure that State and local governments do not engage in divestment activity that, however well-intentioned, would jeopardize United States foreign policy on Sudan and potentially other issues. The current bill is inconsistent with this critical goal, and unnecessarily raises a host of constitutional and legal concerns. For all of these reasons, as well as the reasons the State Department and the Administration have cited in opposing the divestment authorization in this and prior bills, we strongly oppose the divestment portion of this legislation.

We appreciate the opportunity to present our views. Please do not hesitate to call upon us if we may be of additional assistance. The Office of Management and Budget has advised us that, from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,

Brian A. Benczkowski

Brian A. Benczkowski
Principal Deputy Assistant Attorney General

cc: The Honorable Harry Reid
Majority Leader

The Honorable Mitch McConnell
Minority Leader

The Honorable Christopher Dodd

The Honorable Richard C. Shelby

DEPARTMENT OF THE TREASURY
WASHINGTON, D.C.

ASSISTANT SECRETARY

July 30, 2007

The Honorable Harry Reid
Majority Leader
United States Senate
Washington, DC 20510

Dear Senator Reid:

I am writing to communicate the views of the Department of the Treasury with respect to a number of bills pending in the House of Representatives and the Senate that address investment by companies in countries designated as state sponsors of terrorism, such as Iran and Sudan. These bills, including H.R. 180, H.R. 957, H.R. 1400, H.R. 2347, S. 831, and S. 1430, in general would require the President or the Secretary of the Treasury to produce a list of certain companies that conduct business in these countries. Such lists are then intended to be used as a basis for investment and divestment decisions by investors, including state and local governments and mutual fund managers. As legislation is further considered by Congress, we would ask for your consideration of these comments.

There should be no question that the Treasury Department shares Congress' concerns about the actions of state sponsors of terrorism, including the Iranian and Sudanese governments, and agrees that economic pressure is a key component of any comprehensive strategy to alter the behavior of these regimes. Concern about the conduct of these regimes is widespread, and the Departments of the Treasury and State are drawing on all of their resources, influence, and authorities to marshal that concern into international pressure. Imposing meaningful financial pressure requires the cooperation and joint actions of other countries with whom designated state sponsors have significant commercial and financial relationships. In the case of Iran, for example, financial pressure is mounting precisely because the United States is not acting alone. U.S. financial measures against that country, coupled with intense diplomatic efforts, have helped pave the way for multilateral action, including two unanimous U.N. Security Council resolutions. Additionally, the Treasury Department's unprecedented outreach to the international private sector on the risks of doing business with Iran has resulted in a number of major financial institutions scaling back, or terminating altogether, their Iran-related business. Similarly, the United States was actively involved in the adoption of U.N. Security Council resolutions imposing sanctions against Sudan, and the Treasury Department's enhanced efforts with respect to Sudan have included aggressive enforcement of sanctions against those entities violating or attempting to violate United States sanctions against Sudan.

We appreciate your ongoing support of these important efforts. However, we have strong concerns regarding, and cannot support, the current approach of the above referenced bills. Requiring the U.S. government to produce a list targeting the lawful conduct of companies based in allied nations is unhelpful to our multilateral approach. Such a requirement could even be counterproductive, distracting the international coalition from its focus on designated state sponsors of terrorism, such as Iran and Sudan, and toward economic disputes and retaliatory measures against the United States. This shift in focus could jeopardize the support of our allies for multilateral action against the regimes in these countries and, in turn, weaken existing international pressure on them. That outcome would run counter to our shared objective.

Treasury believes there are alternative approaches that would be consistent with both multilateral actions and Congressional objectives. For example, Treasury could support efforts, including legislation, to improve the current Securities and Exchange Commission disclosure requirements. We understand that the Commission is working to find a more effective way to make publicly disclosed information regarding a company's business interests in designated state sponsors of terrorism readily available to the investing public. We believe the opportunity exists to advance such an approach by our working with you and the Commission to enhance transparency so investors can make informed choices – without the same negative effects that would result from a U.S. government-produced list. In addition, self-disclosure would be a more efficient, timely, and accurate means of identifying those firms engaged in the specified conduct.

The Treasury Department appreciates your consideration of these views and looks forward to continuing to work with you on this important issue.

Sincerely,

Kevin I. Fromer
Assistant Secretary
for Legislative Affairs

United States Department of State

*Washington, D.C. 20520*

OCT 22 2007

Dear Senator McConnell:

The Administration shares Congress' deep concern over the continued violence in Darfur perpetrated by the Government of Sudan (GOS), as reflected in the Sudan Accountability and Divestment Act. The Administration welcomes Congress' efforts to focus attention through legislation and other actions on the tragic situation in Darfur. The Administration also appreciates the Senate Banking Committee's willingness to address certain concerns which the original draft of the bill posed for the Administration. However, the Administration would oppose the bill as currently drafted, as it would impede, rather than advance, the President's foreign policy with respect to Sudan.

At this time, and with the support of Congress, the Administration continues unilateral and multilateral sanctions against the GOS. The Administration also strongly supports rapid deployment of the United Nations/African Union Hybrid Mission Darfur peacekeeping force. Recently, the President announced a new round of sanctions against three individuals and thirty-one companies and there are indications that these efforts, and the international support for them, are having an impact on the Government of Sudan.

The Sudan Accountability and Divestment Act, as reported out of the Senate Banking Committee on October 17th, would impose unilateral measures targeted at U.S. allies and diplomatic partners, and would thus shift focus away from the behavior of the GOS, onto differences between the United States and its partners. In doing so, it interferes directly with the President's foreign policy, particularly in its authorization of actions in several areas. First and foremost, we oppose the bill's affirmative authorization for State and local governments to divest from foreign companies doing business in named sectors in Sudan. These provisions

The Honorable
Mitch McConnell,
United States Senate.

could be seen (however incorrectly) as effectively converting State actions – which States are already taking – into federally protected privileges, thereby undercutting the Supremacy Clause and the President's powers thereunder. In fact, we do not believe the interests of either the Article I or Article II branches of Government are served by such legislation – especially in this situation where numerous State divestment actions are currently proceeding without Federal intervention. Such authorization would set a dangerous precedent, making it easier to pass similar legislation in other cases. We believe that the amendment offered and withdrawn by Senator Hagel is absolutely critical to provide the minimal relief needed to address this issue.

We also find unwise the bill's "safe harbor" provision in section 4. This provision removes financial discipline from fund managers and is not useful or necessary, as fund managers may already divest responsibly. By affirming that fund managers may avoid their fiduciary responsibilities in stated cases, these provisions weaken essential legal protections for investors, including workers, retirees and their families, and set a dangerous precedent for extending such immunity. The Committee's revisions to narrow these "safe harbor" provisions effectively acknowledge these dangers, but fall short of fully resolving the underlying problem.

Additionally, while we welcome the Senate Banking Committee's willingness to adopt technical improvements to the provision banning U.S. Government procurement, we also consider this provision ill- advised. Even with its adjustments, this ban still targets companies of our allies, will not meaningfully impact the GOS, and represents an imprudent departure from longstanding United States policy opposing secondary boycotts that could invite retaliation. Finally, we also appreciate the bill's repeal of the prior legislative reporting requirement, as requested.

For these reasons, while we are sympathetic to the desire to address the continuing crisis in Sudan, we cannot support the means adopted in this bill to achieve this end. The Administration is prepared to work with Congress to expand useful authorities which provide a full range of diplomatic and other tools to pressure the GOS.

The international community has affirmed a common goal to alter GOS behavior in Darfur and to this end is supporting efforts by the UN and AU to convene a peace conference October 27 in Libya, in which the GOS and rebel leaders are scheduled to participate. Maintaining focus and consensus on Sudan is critical. To that end, the Administration requests that the Senate defer further consideration of this legislation.

The Office of Management and Budget advises that from the standpoint of the Administration's program, there is no objection to the presentation of this letter.

Sincerely,

Jeffrey T. Bergner

Jeffrey T. Bergner
Assistant Secretary
Legislative Affairs

United States Department of State

*Washington, D.C. 20520*

OCT 22 2007

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